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Supreme Court, U.S.
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In the
Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; and DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and AK STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit decided an important issue of federal law in a way contrary to the decisions of this Court concerning salvage, when it affirmed a district court decision offsetting a conversion judgment with an alleged salvage claim never preserved in either of the two exclusive ways approved by this Court and traditional salvage law?

LISTING OF ALL PARTIES TO THIS PROCEEDING

1. Steven Henry Arthur Adams, for Himself and as Representative of Certain Underwriters at Lloyd's, Petitioner

2. Indemnity Marine Assurance Company, Ltd., Petitioner

3. The Yorkshire Insurance Company Limited, Petitioner

4. Commercial Union Assurance Company PLC, Petitioner

5. Phoenix Assurance PLC, Petitioner

6. Cornhill Insurance PLC, Petitioner

7. Norwich Union Fire Insurance Society, Ltd., Petitioner

8. Northern Assurance Company, Ltd., Petitioner

9. Skandia UK Insurance PLC, Petitioner

10. Ocean Marine Insurance Company, Ltd., Petitioner

11. Folk Sam International Insurance Company (U.K.) Ltd., Petitioner

12. Scottish Lion Insurance Company, Ltd., Petitioner

13. Wurttembergische Feuerversicherung AG, Petitioner

14. Sphere Drake Insurance PLC, Petitioner

15. Dai-Tokyo Insurance Company (U.K.) Ltd., Petitioner

16. UMS Generali Marine S.p.A., formerly known as Union Mediterranea Di Sicurta

17. American Eagle Marine, Inc., Respondent

18. A.K. Steel Corporation, formerly known as Armco Steel Company, L.P., Respondent

19. Britamco Underwriters, Inc.

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Christopher O. Davis
Counsel for UMS Generali Marine S.P.A.

RULE 29.6 STATEMENT

The Petitioner, Steven Henry Arthur Adams, is a competent major and a subject of the United Kingdom of Great Britain and Northern Ireland. The unnamed underwriters are likewise subjects of the United Kingdom of Great Britain and Northern Ireland. The corporate petitioners are publicly traded corporations whose shares may be purchased on various exchanges worldwide.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; and DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

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Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Steven Henry Arthur Adams, etc., et al respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment of the Fifth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana appears not to be reported, but is reproduced herein as Appendix A.

The Fifth Circuit Court of Appeals entered Judgment on September 19, 2000. Appendix B-1. The opinion of the United States Court of Appeals for the Fifth Circuit is published as Adams, et al v. Unione Mediterranea de Sicurta, et al, 220 F.3d 659 (5th Cir. 2000) and is reproduced herein as Appendix B.

Plaintiff's Petition for Rehearing was denied September 14, 2000 and was not officially reported. It is reproduced herein as Exhibit C.

JURISDICTION

Jurisdiction of this Court is involved under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution Art. III § 2 and 28 U.S.C. § 1333.

STATEMENT OF THE CASE

The question of law posed by this writ application is whether there are any circumstances in which a maritime salvor may sell salvaged goods without the permission of the

owner or by order of a federal court and retain his right to an award in salvage. In other words, does the admiralty and maritime law ever countenance "finders-keepers/losers-weepers" in a matter of marine salvage, absent an abandonment sanctioned by Court order? Plaintiffs submit that for nearly two hundred years the decisions of this Court and lower admiralty courts have unanimously answered this question: No. The Fifth Circuit holding, which the petitioners seek this court to review and overturn, creates a rule of law contrary to this overwhelming weight of precedent. In a single sentence, the Fifth Circuit's decision sweeps away two centuries of settled federal law and in its place establishes precedent that approves of a system of "finders-keepers/losers weepers;" a system abhorrent to the spirit of the law.

Petitioners will show that quite to the contrary of the rationale of the Fifth Circuit's ruling, the law as crafted by this Court does not permit a salvor under any circumstances to retrieve imperiled property, neglect or intentionally fail to advise the owner of the operation, sell the property without the consent of the owner or the court and remain entitled to salvage rights. The following review of the decisions of this Court and other admiralty courts unequivocally demonstrates that the law established by this Court does not sanction such behavior and responds to it by depriving the salvage claimant of any rights he may have otherwise been entitled.

The Fifth Circuit's decision strikes at the very heart of the purpose of the law of salvage in two ways. First, it effectively removes the federal courts from their position as the ultimate arbiters of salvage law and permits salvors to unilaterally decide ownership, sale and compensation in salvage salvage matters. Second, it upsets the balance of interests between the public, the salvor and the owners that is the

fundamental purpose of the salvage law as shaped by this Court since the earliest years of its existence. Where the law before the Fifth Circuit's decision maintained an equilibrium among disparate interests, the Fifth Circuit's new rule tilts the system decidedly in favor of the salvor.

Petitioners will further show that the decision has repercussions beyond the limited circumstances of this case. The decision affects two important aspects of interstate and foreign commerce: the shipping trade itself and the insurance business that enables it to operate. This decision will affect the cost of doing business in the first instance by increasing the cost of insurance necessary to allow ocean and river voyages. Secondly, since the decision makes imperiled property fair game to sea-going scavengers, owners and insurers will be required to take expensive measures to insure the security of their property after sinking.

Petitioners, accordingly, submit that the Fifth Circuit has decided an important question of federal law in a manner that not only conflicts with decisions of this Court, but has created a precedent that is inimical to the law established by this Court. A decision that so drastically alters the law affecting a significant branch of interstate and foreign commerce is reserved to this Court.

STATEMENT OF THE FACTS

On October 16, 1993, a million dollars of steel slabs being shipped via a flotilla of barges sunk in the Mississippi River near Vicksburg. While the parties sought to settle the ownership and insurance consequences of the casualty, the steel remained in the river for the next eighteen months; its prime condition unaffected by the fresh water environment of the river. At the end of January 1995, as the parties were concluding the insurance and ownership issues, the respondent American Eagle, who had at one time been under contract to

salvage the cargo, undertook voluntary salvage of the steel. The respondents A. K. Steel and American Eagle were the only parties who knew of the undertaking.

Previous to the beginning of the salvage operation, petitioners/underwriters, who were insurers of the cargo, filed an action for declaratory relief seeking to determine the proper party to whom the insurance proceeds should be paid and which of two insurance policies covering the cargo loss should respond to the casualty. A. K. Steel as the original consignee of the steel was a party to the declaratory relief action. It remained a party until January of 1995 when it foreswore any ownership interest in the steel and was voluntarily dismissed. On February 1, 1995, petitioners/underwriters paid $986,352.40 to Duferco, who was determined to be the owner of the steel. This payment transferred ownership of the steel to petitioners/underwriters.

Eighteen days after the settlement with Duferco, unbeknownst to petitioners, American Eagle raised the first bars of steel from the sunken barges. The operation would last almost three months, most of which was spent in down time because of unfavorable river conditions, cost in excess of $500,000, and resulting in the loss of a tug. However, American Eagle would recover all except a few bars of the steel and sell all the recovered cargo to A. K. Steel, save one bar which remained in the possession of American Eagle, until its bankruptcy.

A. K. Steel began negotiating with American Eagle for the purchase of the steel while it was still a party to the action for declaratory relief. Correspondence between the respondents shows that A. K. Steel knew that it was dealing with the identical steel originally consigned to it by Duferco. There is no doubt that A. K. Steel knew it was dealing with the steel at issue in the declaratory relief action. American Eagle was no neophyte salvor having performed numerous voluntary and

contract salvage actions. It knew that there were insurers and owners involved with the cargo. In fact, one of the insurers specifically advised American Eagle that they were interested underwriters represented by counsel. At no time did American Eagle or A. K. Steel notify the petitioners of the salvage operation nor were the petitioners aware of the operation.

When the last of the cargo was being lifted from the river, petitioners were notified by Canal Barge, the owner of the sunken barge that American Eagle was salvaging the steel. Petitioners immediately demanded that American Eagle and A. K. Steel cease the operations and desist from selling the steel. The demand was ignored and the petitioners initiated this current action by amending their complaint for declaratory relief to seek a judgment in the amount of the value of the steel on the grounds of conversion.

At no time did American Eagle attempt to return the property to the petitioners, attempt to negotiate with underwriters or initiate an action for an award of salvage. A. K. Steel neither offered to settle the claim nor return the steel. It was not until more than two years later, during the pendency of the conversion claim that counsel for American Eagle and A. K. Steel each amended their answers and asserted a right to an award for salvage. By this time, however, all parties agree that whatever claim existed had lapsed and would have been dismissed had it been brought in its own right. However, the lower courts permitted the respondents to assert this alleged salvage claim as a defense on the principle that what cannot be used as a sword may be nevertheless used as a shield. Petitioners have not, as was assumed by both lower courts, admitted that respondents possessed a valid, but stale claim. On the contrary, petitioners have never admitted the validity of the salvage claim but have defended since the outset of the

case on the grounds that a claim for salvage never existed.

Petitioners have argued from the outset that the respondents had no right to claim salvage because they failed to preserve or perfect a claim for salvage. Because the respondents did not return the property or file an action for a salvage award, a claim never existed and was, therefore, never viable for any purpose. The only way then by which the respondents' potential salvage claims could be valid for any purpose would be if the law were changed and a third, yet to be articulated way of preserving a salvage claim were created. This is what the Fifth Circuit did. It changed the law by providing for a third unidentified, unarticulated way in which to preserve a salvage claim.

The petitioners maintain that this decision should be reviewed by this Court in the exercise of its supervisory authority over admiralty and maritime law, because it alters a significant area of federal law, is inconsistent with the long-standing precedent of this Court, and will negatively impact a significant area of interstate and foreign commerce. Petitioners maintain that the law that this decision upsets has been settled and untouched for nearly two hundred years and it is relied upon by the shipping, insurance and salvage industries to govern their business operations. All of these factors militate that the Supreme Court should exercise its authority over admiralty and maritime law and review this decision.

ACTIONS OF THE DISTRICT AND APPELLATE COURTS

The District Court found that American Eagle and A. K. Steel had converted the steel, albeit, negligently. It found that while the non-existent claim for salvage had expired, the

salvage claim could nevertheless be used as a defense to the conversion claim. Accordingly, the Court offset the conversion judgment it entered in favor of the petitioners by the value of the potential salvage claim of American Eagle. The result of this finding was that petitioners were awarded less than one-fifth the value of a million dollars of steel, which award they were incongruously ordered to divide with an insurer that had denied it any had liability for and consequentially refused to pay its share of the loss.

The Fifth Circuit affirmed the salvage findings of the district court. It rejected the petitioners argument that the respondents had not preserved or perfected a claim for salvage as required by the admiralty and maritime law. Although the Fifth Circuit admitted that neither respondent had complied with the traditional requirements necessary to preserve a claim for salvage, it found that "[A]lthough the two defendants did not preserve a salvage claim in the traditional manner, they did properly assert such a right as an affirmative defense and recoupment to the Plaintiffs claims." Fifth Circuit Opinion Appendix "B" page B-30. (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

1. Whether the Fifth Circuit decided an important issue of federal law in a way contrary to the decisions of this Court concerning salvage, when it affirmed a district court decision offsetting a conversion judgment with an alleged salvage claim never preserved in either of the two exclusive ways approved by this Court and traditional salvage law?

SALVAGE JURISPRUDENCE

The ancient and consistent jurisprudence governing salvage is contrary to the law enunciated by the Fifth Circuit in this case. This Court established the policy that would be the foundation of American salvage law very early in the history of the federal jurisprudence on salvage. In the 1804 case of *Mason v. The Blaireau*, 6 U. S. 240 (1804), this Court was asked, inter alia, to decide whether the captain of a rescuing vessel was entitled to an award in salvage in a case where he embezzled a portion of the cargo. Chief Justice Marshall stated the policy considerations that would form the spirit of the salvage law for the next one hundred ninety-six years as follows:

> If a wise and humane policy be among the essential principles which induce a continuance in the allowance of that liberal compensation which is made for saving a vessel at sea, we must at once perceive the ground on which it is refused to the person whose conduct ought to be punished instead of being rewarded. The same policy which is so very influential, in producing the very liberal allowances made by way of salvage, requires that those allowances should be withheld from persons who avail themselves of the opportunity, furnished them by the possession of the property of another, to embezzle that property. While the general interest of society requires that the most powerful inducements should be held forth to men, to save life and property about to perish at sea, they also require that those inducements should likewise be held forth to a fair and upright conduct, with regard to the objects thus preserved. This would cer-

> tainly justify the reduction of the claim, to a bare compensation on the principles of a real quantum merit, and the losses in the cargo, which may be imputed to the captain, would balance that account, if, as it is contended by his counsel, the court could not, on principles generally received, consider the act of embezzlement as a total forfeiture of all right to salvage.

But the case of a mariner, who forfeits his right to wages by embezzling any part of the cargo, is precisely in point. That case stands on the same principles with this, and is full authority for this, since it cannot be denied, that the right to salvage is forfeited by the same act that would forfeit the right to wages.

Early then in its history, this Court found that the law of salvage was a three-sided instrument imposing burdens on the salvors and owners alike for the good of the public interest. The liberality of awards for sea-going salvage carried with it a concomitant obligation on the part of the salvor to perform salvage in a fair and upright manner. To enforce this policy, this Court was not reluctant to require the forfeiture of the right to the award if embezzlement were proven.

Justice Story in *Rowe v. The Brig*, 20 F. Cas. 1281 (Cir. Ct. Mass. 1818), a case in which he was riding Circuit, stated the policy on which salvage law is founded as follows:

> In cases of salvage, the measure of the reward has never been adjusted by a mere estimate of the labor and services performed by the salvors. These, to be sure, are very important ingredients; and are greatly enhanced in value, when they have been accompanied by personal peril and gallantry, by prompt and hardy enterprise, and by severe and long-continued exposure

> to the inclemencies of wind and waves. But an enlarged policy, looking to the safety and interest of the commercial world, decrees a liberal recompense, with a view to stimulate ambition, by holding out what may be deemed an honorable reward. *Nor should it be forgotten, that the same policy has a strong tendency to discourage petty plunderage and concealment of the property saved; and to induce salvors to bring it in good faith before judicial tribunals, and rely upon their justice for ample remuneration.* (Emphasis supplied.)

Again in the Bello Corrunes, 19 U. S. 152 (U. S. 1821) this Court in rejecting the salvage claim of the crew of a privateer stated the Rule of salvage as follows:

> As to the claim of the salvors, it may be remarked, that maritime Courts always approach them with great benignity and favor. Yet, in proportion to the inclination to favor where there is merit, is the indignation with which they view *every indication of a disposition to take advantage of the unfortunate.* Spoilation, and even gross neglect, may forfeit all the pretensions of salvors to compensation. In the case before us, it is not too much to pronounce the claim of those of the crew of Puyerredon (the privateer) who libel for salvage, to be not only groundless but impudent; for, besides spoilation, smuggling, the grossest irregularities, it is perfectly clear from the pilot's evidence, that they ran the vessel on the shore purposely. *So, that whatever may have been the reality of their benevolent designs toward the Spanish owners originally, their subsequent conduct not only cause a doubt over their candor, but divests them of all pretensions to compensation.* (Emphasis supplied.)

In the matter of *The Boston*, 3 F. Cas. 932 (Circuit Court of Mass. 1833), Justice Story, again riding circuit, dealt with a case that in many respects is similar to this case in the way in which the salvors took advantage of the vessels's misfortune. The Boston was in dire straits near Cape Cod when it was taken into tow by the Magnolia. After performing what was admittedly admirable service in rescuing the foundering Boston, members of the crew of the Magnolia sacked the ship and looted its cargo and tackle and gear. Justice Story, whom the treatises credit with the creation of a stable and coherent admiralty law out of the early chaos of the precedent, set out clearly and distinctly the salvage law as it has been interpreted for the next one hundred sixty-seven years:

> The maritime law demands of the parties engaged in maritime concerns scrupulous good faith and uprightness of conduct. And it prescribed this most emphatically of salvors, giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence. *See Mason v. The Blaireau*, 2 Cranch [6 U. S.] 240; (other citations omitted). But in cases of embezzlement the law would fall short of its usual foresight, if it did not inflict a more admonitory punishment. Accordingly, it will be found, I believe, in maritime jurisprudence of the whole world that, that embezzlement by salvors, directly, or by connivance, is punished by forfeiture of all claim to salvage. In morals, in general justice, in sound policy, it should be so; for what can be more inhuman, or more thoroughly without apology, than to plunder the distressed, or to add the losses of fraud to the unavoidable calamities of shipwreck? In American and English law the doctrine is fully recognized; and it is

applied with unfaltering firmness, whenever the fact is clearly established. (Citations omitted).

Next, Justice Story sets out in precise terms what was necessary to make out a valid claim for a salvage award, whether in rem or in personam.

> A court of admiralty is to the extent of its jurisdiction, at least in cases of this sort, a court of equity; and the same rule applies here, as in any other court of equity, that the party, who asks aid, must come with clean hands. In cases of salvage, the party founds himself upon a meritorious services, and upon the implied understanding, *that he brings before the court, for its final award, all the property saved with entire good faith; and he asks a compensation for the restitution of it uninjured, and unembezzled by him. However meritorious the act of saving may have been, if the property is subsequent lost, and never reaches the owner, no compensation can be claimed or decreed.* (Citations and text omitted).

> The compensation to be awarded, therefore, presupposes good faith, meritorious service, complete restitution, and incorruptible vigilance, so far as the property is within the reach, or under the control, of the salvors. *What claim could be more extraordinary than an annunciation by a salvor in a court of justice, that he has saved the property, and had afterwards perpetrated a gross fraud or theft upon the owner, for the purposes of withdrawing the property from him; then to ask, in the same breath, for compensation for his labor, notwithstanding his iniquity? Such a claim, it seems to me, would be at war with the first principles of justice, and certainly with those of all maritime jurisprudence. I hold, that*

> *every act of misconduct of the salvor, as to the property, fraudulently or wantonly done to the injury of owners, at any time before salvage is to be decreed, is to be treated in the same way, as if it occurred, while the property was in their exclusive possession.* (All emphasis supplied.)

This has seemingly been the law of the land since the inception of the reported admiralty law. See also *The Island City*, 66 U. S. (1Black) 121, 17 L. Ed. 70 (1861). And it seemingly was the law in the Fifth Circuit. See *Jackson Marine v The Blue Fox*, 845 F. 2d 1307 (5th Cir. 1989). The argument that either of these respondents should be afforded the benefit of a salvage is patently at war with the first principles of maritime jurisprudence.

As a result of the policy established by this Court in the foregoing cases, admiralty courts, to enforce the first principles of maritime jurisprudence, have required that salvors either return the property to the owner, which would permit of an action *in personam*, or by filing an action against the res, the so-called action *in rem*. In either event the salvor has sought the authority of the court for the fixing of his reward and has complied with the policy that he should not dispose of the property without the approbation of the court. According to Norris in Benedict on Admiralty,

> The cases are clear that a total forfeiture of the salvor's award, will be declared by the court when the salved property has been looted, stolen, concealed, unlawfully appropriated, embezzled, destroyed, etc., and the proof of such acts has been established beyond a reasonable doubt. Norris, Benedict on Admiralty @ sec. 104 page 8-16.

The case law makes equally clear that it is the duty of the salvor to bring the property to a safe port where it can be in a position to be claimed by owner or brought under the control of the admiralty court. Norris, Benedict of Admiralty, *supra* @ § 19 page 8-40. Later on his treatise, Norris revisits this issue. In the following excerpt, he clearly distills the essence of what this Court and the lower admiralty courts have held the law to be over the last two hundred years.

> It can be stated again that the owner of property in distress or lost on navigable waters, is not divested of his ownership. This is true whether the property is derelict and floating on the water, a stranded wreck breaking up on a beach or where it is reposing fathoms deep. The salvor who rescues such property does so for the benefit of the owner, the principle that underlies the salvage law of all maritime nations. The salvor does not become the owner of the salved property by virtue of his services. He merely has a maritime lien granted by the general maritime law to ensure that his reward for saving the property will be satisfied out of the property saved.
>
> ***It becomes the duty and the obligation of the salvor to bring the aided property to a safe place for eventual return to the owner or, at least, to where the owner may be in a position to reclaim his property. Unless there has been some adjustment between the salvor and the owner, the property must come under the custody of the admiralty court by virtue of the filing of a complaint against the property and the arrest of the salved property by the United States Marshal. The salvor does not simply have the right to keep the salved property and should he do so, would become subject to a suit for conversion.*** (Emphasis supplied).

Uniformity of International Law

Likewise, the law established by this Court is apparently the law recognized and enforced by the world's maritime nations, including The United Kingdom, and is certainly the law as recognized by The Salvage Convention of 1910 (The Salvage Act, August 1, 1912, c. 268, 46 U.S.C. 726, *et. seq.*) and the International Convention on Salvage, 1989. The law formulated by this Court is also in general outline and purpose the same as our major trading partners, The United Kingdom, Japan, Korea and the various members of the European Union. See the laws of The United Kingdom. The Merchant Shipping (Salvage) Act, 1916 (6 and 7 Geor. 5, c. 5, Sch. 21). The foregoing nations along with the United States are all signatories of the International Convention on Salvage, 1989. Moreover, the law as established by this Court is the foundation of treaties between the United States, Canada and Mexico. (U.S. Statutes at Large Vol. 35, page 2035 (Canada) and U.S. Statutes at Large Vol. 49, page 3359 (Mexico)). Accordingly, the international salvage law is in conformity with the law recited in the foregoing.

According to the foregoing jurisprudence, the viability of a salvage claim is wholly dependent on the salvor adhering to the requirements that the property either be returned to the owner or brought to the court for disposition. The jurisprudence admits of no exceptions nor does it provide a third way.

The lack of modern or contemporary case precedent affecting this area of the law proves that the law crafted early in the history of the federal courts has worked admirably in regulating the business and commercial interests associated with salvage. In short, the law as enunciated by Marshall,

Story, Johnson and Clifford has worked so well that the level of reported litigation has been kept to a minimum. Accordingly, the petitioners would suggest to the Court that there is no reason to alter or in any way modify this law. In other words, "if it ain't broke, don't fix it."

Only this Court has the Power to Effect this Change in the Law

The Fifth Circuit's rationale for finding for the respondents is clearly apposite the jurisprudence quoted above. This is not a case of erroneous findings of fact or misapplication of the law. The facts are not disputed nor did the court misapply good law. In this case, the Fifth Circuit decided the instant case contrary to the weight of two hundred years of jurisprudence of this Court and the admiralty courts of the nation, including its own decisions, and created a new rule of salvage law. In so doing, the Fifth Circuit has invaded the precincts of this Court and has decided a matter that this Court and this Court alone should establish.

This question raised by this writ application relates to the jurisdiction granted federal courts over admiralty and maritime jurisdiction. (Article III § 2, cl. 1, United States Constitution). This clause has been interpreted to be more than a grant of jurisdiction empowering the federal courts to entertain admiralty suits. This court has interpreted the clause to empower federal courts to draw on and develop the substantive admiralty law. But this Court has likewise found that Congress is empowered to revise and supplement with legislation admiralty and maritime law within the constitutional limits defined by this Court. *Romero v. International Terminal Operating Co.,* 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959). While in theory the Fifth Circuit under

Romero, can develop the substantive law, that power is subject ultimately to the power of this Court as the admiralty law's chief architect.

Petitioners submit that based on its position as the chief architect of the admiralty law, this Court, and not a lower court, should be the author of a change in the law this wide-sweeping. As described in the next succeeding sections of this writ application, the rationale for this decision creates a sea change in the law and a concomitant change in the way business will be conducted. A change in the law of this magnitude is one that properly belongs to this Court.

Technological Revolution

In the last several decades, there has been a revolution in the technology used to retrieve sunken vessels and cargo. Side scan sonar has made it possible to image wrecks and sunken artifacts so that salvors can more readily find sunken property. Robot probes have allowed the sea to actually give up the wrecks of its dead mariners. Consequentially, vessels and artifacts either impossible to reach because of the state of the technology or hidden from detection are now being brought up from the deeps. This has in its turn required Congress, this Court and lower federal admiralty courts to deal with issues relating to the ownership of archeological artifacts, of vessels thought to be lost forever and of the ever-alluring sunken riches of Spanish treasure galleons. This Court has addressed issues concerning the powers of Congress, the powers of state governments and the power of federal Courts to adjudicate the ownership of salvaged property. In particular, this Court has been called upon to adjudicate disputes between state governments and voluntary salvors over the ownership of ancient shipwrecks and dis-

putes among salvors over the rights to famous shipwrecks such as the Titanic. We submit that the issue presented by this writ application is as important if not more so than the romantic salvage cases this Court has entertained previously. We submit that the importance of this area of the law to the shipping, insurance and salvage industries militates in favor of this Court exercising its supervisory power to review this decision.

Potential Effect on Interstate and Foreign Commerce

While the steel slabs in this case do not have the aura or mystique of the Titanic or the romance of a Spanish gold galleon, the issues surrounding their disposition bear on and significantly affect an area of maritime commerce that is certainly more important and more valuable to the current economy than the Grand Staircase of the Titanic or the plundered gold of the Incas. Data accumulated by the United States Department of Transportation, other federal agencies and private associations demonstrate that the large volume of commerce is exposed to the vicissitudes of the sea, and the dramatic, detrimental effect the Fifth Circuit's new salvage rule will have on these multi-billion dollar industries.

According to the United States Maritime Administration (MARAD) ninety-five percent of all oversea trade enters or leaves the United States via ships. According to the U. S. Foreign Waterborne Transportation Statistics released in the joint report of MARAD and the Corps of Engineers, the total value of waterborne imports and exports in 1999 was $672.614 billion. The Corps of Engineers December 1999 U. S. Waterway System-Transportation Facts reports that the tonnage on the Mississippi River between Minneapolis and the Mouth of the Passes was 324 million short tons annually. The tonnage from the mouth of the Ohio to Baton Rouge -

the stretch of river where this casualty occurred was 195.9 million short tons. See Appendix E.

Some of this cargo and the vessels carrying it are inevitably lost to the sea and rivers. In its year 2000 report, the International Salvage Union, a trade association representing salvors world-wide, reported that its members had salvaged in excess of $1 billion per year in international cargo and vessels since 1978. As is demonstrated by the foregoing data, the amount of commerce potentially affected by this change in the law is exceedingly large. Without the surety that the salvor must return salved cargo or seek compensation in Court, and without the assurance that a federal court will act to deter violations of this policy, the cargo and hull insurers will be required to minimize their risks with higher insurance premiums that in turn will be borne successively by the carriers and shippers and ultimately by the consuming public.

Balance of Interest

The law of salvage is in essence a balancing of three rival and competing interests: the public, the owner of the imperiled cargo, and the salvor. This Court ought to exercise its supervisory jurisdiction because the decision unhinges the delicate balance of interest that its precedents have struck among the interested parties. The early case law firmly settled this balance. Admiralty courts until now have scrupulously enforced the equilibrium. The Fifth Circuit decision by shifting that balance of power in favor of the salvor strikes directly at this equilibrium, which is at the very heart of salvage law itself.

The symmetry that the law seeks to obtain is first premised on the desire to encourage the potential professional salvor and the seafaring community in general to stop and render

assistance. The law that evolved out of this public policy seeks to minimize the losses that are an inevitable part of water-borne commerce and to foster the flow of commerce by imposing order and discipline in what is a difficult and dangerous enterprise. The aim of the law is to lessen the financial burden on the owner by returning his property to him and yet to reward the salvor for intrepid service.

The Position and Authority of Federal Admiralty Courts

Enforcing and implementing the balance between owner and salvor is one of the central concerns of the early case law. Central to maintaining this equilibrium among the rival interests is the federal admiralty court.

The initial error in the Fifth Circuit's decision is the removal of the federal admiralty court from its position as the ultimate arbiter of the salvage process. The Fifth Circuit's decision approves of a salvor retaining salvaged property and not advising the owner and then disposing of the property by selling for its own benefit to a party who knew the property belonged to others. Sanctioning this conduct essentially vitiates the function of the admiralty court as the overseer of the salvage process. If the salvor may retain and sell the property with impunity, then the federal court has no function in the process other than to rubber stamp the salvor's appropriation of the cargo or hull. Without the admiralty courts as guardians of the salvage policy, the public interest is jettisoned, salvaged property is fair game to sea-going scavengers and the free flow of commerce is impaired.

Dispensing with the necessity of applying to admiralty courts for relief denies the owners right to the return of his property. The law before this decision made the federal

admiralty court an indispensable arbiter before whom the parties establish their respective rights. This decision now permits the salvor at its sole discretion to secrete the cargo, sell it without the consent of the owner and then await the owner to discover the miscreances. Under this decision there is no incentive, even for the honest salvor, to return the property or seek compensation in Court. The incentive provided by this precedent is to quickly dispose of the property before discovery. Both the district court and the Fifth Circuit have in effect applied the law of "finds" to this case with the twist that the salvor and his purchaser are allowed to effectively obtain the ownership of the property without Court approbation.

Contrasting the Two Systems

The contrast between the two systems of law is stark and the results diametrically opposite. Consequentially, the benefits and burdens of the two systems are glaringly different. Under the traditional law the burden rests upon the salvor to either return the property or to institute legal proceedings in order to have any benefit whatsoever from the performance of its services. The rationale for this is obvious. The salvor has the property in his possession and in that sense has the upper hand on the owner or insurer. The law balances the power equation by burdening the salvor with the requirements of either settling with the owner or seeking redress from the admiralty court.

The law as changed by the Fifth Circuit no longer requires the salvor to return the property and displaces the federal court from the process until and unless the miscreance is discovered by the owner. In short, this decision rather than encouraging the salvor to guard and protect the rights and property of the owner actually fosters the exact opposite

behavior. Instead of protecting the property, it encourages or, should we say, emboldens the salvor to secrete the property and avoid the admiralty court.

While the consequences of this change are devastating to the interests of the owners, even more important is the inevitable mischief that this decision will inflict on commerce and trade in general. Under the Fifth Circuit's decision, owners and insurers can no longer be assured by black letter law that sunken and imperiled cargo and vessels will be protected by admiralty courts from plunder raids by seagoing opportunists such as American Eagle and purchasers like A.K. Steel. The result is that owners and insurers must take adequate means to protect imperiled cargo. Without adequate protection from the courts, owners and insurers will have to take steps to provide security, which means the incurring of expenses that until this decision were totally unnecessary. The result of this added expense is an inevitable increase in premiums to cover the additional expense of security. The cost of additional expenses, of course, is passed along until it is placed ultimately on the consuming public.

The new version of the law created by the Fifth Circuit actually precludes the owner from obtaining either the salved property or its full value, even should he be lucky enough to discover the misappropriation. The final irony is that under the Fifth Circuit's decision even discovery of the miscreance does not insure that the wronged owner or insurer will recover either the property or it value. On the contrary this decision allows a salvor and its purchaser, neither of whose hands were clean, to use a claim that never existed as a defense to a claim of conversion.

Viability of the Salvage Claim

The decision is logically antithetical to the reasoning process underlying the salvage law. According to the ancient jurisprudence and the Fifth Circuit's admission, American Eagle's salvage claim was never perfected. The respondents did nothing during or immediately after the salvage to perfect or preserve the claim. They neither returned the property or instituted an action for salvage. They could not perfect a lien against the property nor could they bring an *in rem* action because they sold and/or destroyed the property. They had no cause of action *in personam* against the owners/insurers for salvage because the petitioners never had possession of the property. If the respondents had brought an action for salvage against the petitioners even within the time limitations, the claim would have been dismissed under Rule 12 (b) (6) dismissal or Rule 56 summary judgment. There could be no *in rem* claim because there simply was no res, as the steel was converted into A. K. Steel's finished products. Moreover, there could be no action *in personam* as the underwriters never had the property in their possession. *Lambros Seaplane Base v. The Batory*, 215 F.2d 228 (2d Cir. 1954). In the logic of the salvage law, there was no claim that could be resuscitated.

The Fifth Circuit decision breathed life into the dead body of the respondents' salvage claim by holding that "asserting," that is, pleading the claim, is sufficient to instill life into what never existed. This decision makes no sense in the context of the salvage law. In essence, the Fifth Circuit opinion grants viability to a non-existent claim by allowing attorneys to plead it months and even years after the property was removed from the water, sold and destroyed in a blast furnace. Instead of analyzing the behavior of the salvor dur-

ing the course of the salvage operation and determining whether the salvor met its burden of establishing a right to an award, this decision literally allows lawyers to preserve the right to a salvage claim.

Actually, the law requires very little analysis of the salvor's conduct. All that the appellate and district courts needed to decide was whether the salvor, American Eagle, returned the steel to the petitioners or sought the aid of the admiralty court in resolving this dispute.

The Fifth Circuit misreads *Basic Boats, Inc. v. U.S.*, 311 F. Supp. 596 (EDVA 1970) supporting its version of the law. That case does not, in any sense, support the court's reasoning. The only reason that the U.S. Navy could successfully plead set-off was because it had returned the res to the owner. The question in this case is not and never has been staleness as the Fifth Circuit panel and the District Court perceived, but the very existence of a claim in the first instance.

Finally, the Fifth Circuit provided no factual basis for how the salvage claim was preserved, other than it was "asserted". Accordingly, the Fifth Circuit gives future litigants no guidance on what kind of conduct on the part of a salvor will be sufficient to assert a claim. Owners, insurers and salvors are all left adrift without a marker by which to navigate.

CONCLUSION

Petitioners do not believe that the Fifth Circuit's interpretation of the law is the kind of law envisioned by the Justices that crafted the rules of salvage law. In fact, the simple sentences of the Fifth Circuit's opinion unseam the very fabric of the law and open up a major area of commerce to chaos. In a way, this decision unwittingly institutes a salvage system reminiscent of the law of the ancient Gauls.

According to the ancient sources, the Gallic law allowed the finder to keep the property washed ashore and even to enslave an unfortunate crew that happened to survive a shipwreck or in some cases an ambush. The law of salvage was created in large measure to put an end to the kind of piratical behavior sanctioned by such laws.

What occurred in this case was exactly the kind of clandestine behavior that the salvage law was instituted to prevent. The removal and sale of the steel was a plain and simple embezzlement. Embezzlement is defined by Black as the fraudulent appropriation to his own use or benefit of property or money intrusted to him by another, by a clerk, agent, trustee, public officer, or other person acting in a fiduciary character. Black's Law Dictionary, p. 614, Revised Fourth Edition: (1968).

Since a salvor is an unsolicited agent (negotorium gestor) who owes the owner a fiduciary duty, the removal and sale of steel by these respondents was and remains an embezzlement, pure and simple. See *The Amethyst*, F. Cas. 330 (D. Me. 1840). Salvage law visits on the embezzler's right to recover an award a capital sentence. A capital sentence should be visited on A. K. Steel and American Eagle's right to assert a salvage claim in any form, because of the breach of their fiduciary duty. The salvor and the owner are not simply engaging in another business deal where the parties seek to maximize their benefit at the expense of the other. Salvage carries with it a solemn burden of trust under which the salvor is required by operation of law to act on behalf of the owner to insure he receives his property or its value. A salvor should never be allowed to take property, even derelict property, without the consent of the owner or the Court.

The case of *Falgout Bros. v. The S/V Pangaea*, 966 F. Supp. 1143 (S.D. Ala. 1997) provides a succinct exposition of salvage law and an exemplar of how a salvor and a court ought to handle these matters. The vessel was derelict, adrift, bereft of crew and when brought to port by the crew of the rescuing vessel was placed in the custody of the U. S. Marshal. The crew of the Falgoust Brothers' vessel then libeled the vessel *in rem* as required by law and sought to have the vessel declared abandoned. The vessel went unclaimed when advertised as required by the Court order. The Court declined however to declare the vessel abandoned, but awarded the crew a salvage award that would be satisfied out of a judicial sale of the vessel. What occurred in the *Pangaea* case clearly exemplifies the law of salvage. It describes the law as created and nurtured by this Court for two hundred years. Petitioners maintain that the actions of the Falgoust crew is the only way to properly retain a salvage claim. The Alabama district court's analysis demonstrates the correct reasoning process to apply to these types of cases. Petitioners believe that we have shown that the Fifth Circuit's opinion is antithetical to the letter and spirit of two hundred years of constant and consistent jurisprudence and accordingly this Court should exercise its supervisory power to review and reverse this decision.

In contrast to the reasoning and logic of the court in the *Falgoust Brothers v. The S/V Pangaea*, the decisions of both the Fifth Circuit and the district court appear to be premised on equitable considerations. The underlying reason for the decisions in this case was to allocate the cost of salvaging the cargo among the parties. Both courts seemed to have concluded that it would be inequitable for the petitioners to recover one hundred percent of the value of the steel in light of the expenditure of $500,000 in salvage costs in the

successful rescue of the cargo. The Courts each seemed to have concluded that to follow the rigorous, but clear mandates of the salvage law would have resulted in unjustly enriching the petitioners. In part this conclusion appears to have been bolstered by the mistaken assumption that the property would not have been rescued had not American Eagle performed the operation. Accordingly, the Courts below felt the need to balance the scales. In fact, from the beginning of the case, petitioners were willing to pay respondents a reasonable share of the cost of the salvage.

On the surface, this apportionment of the cost of salvage appears to be a felicitous resolution of the controversy in as much as the parties are each sent away bearing a portion of the loss. On deeper reflection, however, the fairness of the solution is revealed as highly suspect. In truth, neither decision effected substantial justice if balancing the ledgers were the object of a judicial action involving salvage. (The purpose of the action is not, however, allocation of liability for costs but rewarding intrepid service that preserves the owner's property.) A review of the break down of the numbers makes it patently clear that the petitioners were not equitably treated by the decisions. The petitioners paid nearly a million dollars for the steel and received a mere $37,000 for it under the trial court holding, hardly an equitable apportionment of the cost. The ultimate effect of the appellate court's reversal of the jurisdictional issue may unintentionally result in the petitioners recovering approximately $200,000 of the loss, still only a recoupment of little more than twenty percent. On the other hand, American Eagle was allowed to offset its entire expenses and retain the excess over expenses of $75,000. A. K. Steel was allowed to obtain the steel which had been originally consigned to it for a price considerably less than the original purchase price.

Viewed in this light from the prospective of the petitioners, the decisions are far from equitable.

While one can understand the reasoning behind the desire to balance the scale as far as American Eagle is concerned, that logic vanishes when one considers the role played by A. K. Steel in this case. A. K. Steel knew from the very outset of its negotiations with American Eagle that the steel slabs belonged to petitioners. A. K. Steel knew the vintage, quality and price of the steel. It knew that American Eagle had no idea about the price of the steel. To award A.K. Steel the benefit of the doubt under these circumstances is not equitable and completely misconstrues the facts.

But result and equity should not be the determinative basis of a decision with regard to salvage. The Fifth Circuit decision as in the case of most result-driven decisions wind up doing violence to the law and thwarting the reasoned policy underlying the law. In the case of salvage law, the policy and equitable result are already woven in the mandates of the law. The exclusive requirements established by the traditional law approved by this Court are intended to effectuate equitable results. The law over the last two centuries has been crafted in such a way that a just and equitable result is already factored in. Decisions of this type may momentarily affect a balance of perceived inequities, but in the end they lay the groundwork for dismantling a body of law. In this particular case, they open the door for discarding a body of law that has served the country and world well for two centuries.

The result of this case is not important in itself. What is important is the integrity and uniformity of the salvage law. Like it or not the Fifth Circuit's decision is now part of the body of the admiralty and maritime law of this country. It is now precedent for future result-oriented decisions that

will further erode the policy underpinning the law. The way is now open to scrap the time-honored principles of salvage law in favor of a system based on subjective appreciation of the facts. Most importantly of all, the system that is being created by this decision provides no standards by which the commercial community can judge what is permitted and what is not. In the future, worse facts than these will create even worse law. To allow the Fifth Circuit decision to remain in the body of the admiralty law is the first step in the creation of a body of law dependent on the arbitrary appreciation of the equities by individual courts. In the end it is the uniformity of the admiralty law that is jettisoned.

Respectfully submitted,

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